SUPERIOR COURT
OF THE
STATE OF DELAWARE

E. SCOTT BRADLEY
JUDGE

SUSSEX COUNTY COURTHOUSE
1 The Circle, Suite 2
GEORGETOWN, DE 19947

February 27, 2009

Henry C. Davis, Esquire
Henry Clay Davis, III, P.A.
303 N. Bedford Street
P.O. Box 744
Georgetown, DE 19947

Dennis J. Menton, Esquire
Leroy A. Tice, Esquire
Tybout, Redfearn & Pell
750 Shipyard Drive, Suite # 400
Wilmington, DE 19899-2092

RE: State of Delaware v. Angela Jones
C.A. No. S08A-05-001-ESB
Letter Opinion

Date Submitted: October 28, 2008

Dear Counsel:

This is my decision on the State of Delaware's appeal of the Industrial Accident Board's finding that Angela Jones suffered a recurrence of total disability.

STATEMENT OF FACTS

Jones worked for the State as a nursing assistant at the Stockley Center. She injured her neck and shoulder while lifting a patient off of a toilet in 1999. Jones underwent an anterior surgical fusion in 2000. However, it did not relieve all of her pain. Jones received total disability and then partial disability benefits for a period of time. The State and Jones finally stipulated to a commutation of her partial disability benefits in 2002.

Jones returned to work as a secretary at a convalescent center in 2004. She was terminated from that job for being late to work too many times in 2007. Around the time that Jones was terminated from her job, she complained of increased neck and shoulder pain to her treating doctor,

Gabriel J. Somori, M.D. Dr. Somori told Jones not to work until he could get her pain under control.

Jones filed a petition with the Board for recurrence of total disability on October 23, 2007. The Board held a hearing on February 28, 2008. Jones, Dr. Somori, James P. Marvel, Jr., M.D., Ann Smith, and Robert Stackhouse testified at the hearing. Jones testified about her accident and treatment. Dr. Somori is board certified in pain management. He testified about his treatment of Jones. Jones complained to Dr. Somori's assistant of a severe increase in her neck and shoulder pain on March 28, 2007. Dr. Somori told her not to work until he could get her pain under control. He gave Jones a daily regime of oxycotin, oxycodene, motrin, lyrica, and lioderm patches. Dr. Somori agreed that Jones could return to sedentary work as of February 4, 2008. Dr. Marvel is an orthopedic surgeon. He examined Jones a number of times and appeared for the State. Dr. Marvel testified that Jones' condition had not changed and that she could continue to do sedentary work. Smith was the director of nursing at the convalescent center. She appeared for the State and testified about Jones' termination. Stackhouse is a vocational rehabilitation specialist. He appeared for the State and testified about sedentary jobs that Jones could do. The Board found that Jones sustained a recurrence of total disability from March 28, 2007 to February 4, 2008, reasoning that Jones' severe increase in her neck and shoulder pain established a recurrence and that Dr. Somori's no-work order established total disability. The State then filed an appeal of the Board's decision.

STANDARD OF REVIEW

The Supreme Court and this Court repeatedly have emphasized the limited appellate review of the factual findings of an administrative agency. The function of the Superior Court on appeal from a decision of the Industrial Accident Board is to determine whether the agency's decision is

supported by substantial evidence and whether the agency made any errors of law.[1] Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.[2] The appellate court does not weight the evidence, determine questions of credibility, or make its own factual findings.[3] It merely determines if the evidence is legally adequate to support the agency's factual findings.[4] Absent an error of law, the Board's decision will not be disturbed where there is substantial evidence to support its conclusions.[5]

DISCUSSION

The Board found that Jones sustained a recurrence of total disability. The State has challenged every aspect of the Board's ruling. In order to obtain compensation due to a recurrence of total disability, Jones had to establish that her current ailments are causally related to her work-place accident and that she has suffered a recurrence of those ailments that entitles her to total disability benefits.[6] Jones injured her neck and shoulder at work in 1999. She never completely recovered and complained of increased neck and shoulder pain to Dr. Somori's assistant on March 28, 2007. Drs. Somori and Marvel both testified that Jones' neck and shoulder pain were causally related to her work-place accident in 1999. Thus, there is no dispute on this issue and the Board's

---

[1] *General Motors v. McNemar*, 202 A.2d 803, 805 (Del. 1964); *General Motors v. Freeman*, 164 A.2d 686 (Del. 1960).

[2] *Ocean Ind. v. Wilmington Stevedores*, 636 A.2d 892, 899 (Del. 1994); *Battista v. Chrysler Corp.*, 517 A.2d 295, 297 (Del. 1986), *app. dism.*, 515 A.2d 397 (Del. 1986)(TABLE).

[3] *Johnson v. Chrysler Corp.,* 213 A.2d 64, 66 (Del. 1965).

[4] 29 Del.C. § 10142(d).

[5] *Dellachiesa v. General Motors Corp.*, 140 A.2d 137 (Del. Super. 1958).

[6] *Macy's v. Campbell*, 2006 WL 1816219, at *3 (Del. Super. June 28, 2006).

finding that Jones' neck and shoulder pain were causally related to her work-place accident in 1999 is supported by substantial evidence in the record.

"Recurrence" is defined as "the return of an impairment without the intervention of a new or independent accident."[7] If a condition has not changed for the worse, then no "recurrence" has occurred. Moreover, a slight change in impairment will not support a finding of "recurrence" of total disability.[8] The medical testimony on this issue was in conflict. Dr. Marvel testified that Jones' neck and shoulder pain had not changed. Dr. Somori testified that they had. The Board accepted Dr. Somori's testimony over that of Dr. Marvel. When faced with conflicting expert testimony, the Board may choose which testimony to accept and which to reject.[9] The Board accepted Dr. Somori's testimony because he had seen and treated Jones many times over a number of years, while Dr. Marvel had only seen Jones a few times and never treated her.

Dr. Somori testified that Jones complained of a severe increase in her neck and shoulder pain. Jones testified that she told Dr. Somori that she worked until she simply could not take it anymore. She also told him that she felt numbness and tingling in her right hand. The pain in Jones' neck and shoulder was obviously much more than a slight change in condition. Jones clearly had a recurrence of her impairment and there is substantial evidence in the record to support that finding.

Jones' increased pain in her neck and shoulder occurred without the intervention of a new or independent accident. It is, of course, sometimes difficult to prove a negative. The only other problem that Jones has is low-back pain. Dr. Somori testified that this was caused by arthritis,

---

[7] *Disabatino and Sons, Inc. v. Facciolo*, 306 A.2d 716, 719 (Del. 1973).

[8] *Walden v. Georgia-Pacific Corp.*, 1999 WL 801437, at *3 (Del. Sept. 22, 1999).

[9] *Reese v. Home Budget Center*, 619 A.2d 907, 910 (Del. 1992).

degenerative problems and weight. He also testified that this was not Jones' primary problem. Moreover, the problem with Jones' back is unrelated to her neck and shoulder pain. There is simply nothing in the record to indicate that Jones' increased neck and shoulder pain was caused by anything other than her work-place accident in 1999.

The Board also found that Jones was totally disabled. This was based on Dr. Somori's no-work order. Jones suffered a work-related injury in 1999. She was on total disability and then partial disability for a period of time. Jones returned to work in 2004. She was terminated because she was late to work too many times in 2007. Jones told the Board that she was late so much because her neck and shoulder pain had become unbearable, making it difficult for her to get to work on time. Jones made the same complaints to Dr. Somori. He told her not to work until he could get her pain under control. It is well-established that a worker who suffers a work-related injury is entitled to rely on her doctor's order not to work and that the doctor's no-work order can form the basis for total disability compensation.[10] Thus, the Board's finding that Jones was totally disabled from March 28, 2007 to February 4, 2008 is in accordance with the applicable law and supported by substantial evidence in the record.

CONCLUSION

The Industrial Accident Board's decision is affirmed.

Very truly yours,

E. Scott Bradley

oc: Prothonotary's Office

[10] *Gilliard-Belfast v. Wendy's, Inc.*, 754 A.2d 251, 254 (Del. 2000); *Smith v. James Thompson & Co.*, 918 A.2d 1164, 1165 (Del. 2007).